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IN THE

Supreme Court of the United States

October Term, 1964

No. 892

HEAVENLY CREATIONS, INC., a corporation; J. B. PROMOTIONS, INC., a corporation; AMERICANA STAR SILVER CORP., a corporation; and SAM S. GOLDSTEIN and SYLVIA GOLDSTEIN, individually and as co-partners trading as SUN GOLD INDUSTRIES and as officers of each of said corporations,

Petitioners,

AGAINST

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

HEAVENLY CREATIONS, INC., a corporation;
J. B. PROMOTIONS, INC., a corporation;
AMERICANA STAR SILVER CORP., a corporation; and
SAM S. GOLDSTEIN and SYLVIA GOLDSTEIN, individually and as co-partners trading as Sun Gold Industries and as officers of each of said corporations,

Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

HEAVENLY CREATIONS, INC., a corporation; J. B. PROMOTIONS, INC., a corporation; AMERICANA STAR SILVER CORP., a corporation; and SAM S. GOLDSTEIN and SYLVIA GOLDSTEIN, individually and as co-partners trading as SUN GOLD INDUSTRIES and as officers of each of said corporations,

Petitioners.

AGAINST

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners herein hereby apply to this Court for a writ of certiorari to the Court of Appeals for the Second Circuit in connection with the denial by that Court of an Order vacating an Order of the Federal Trade Commission and decreeing enforcement of the said Order.

Jurisdiction

This Court has jurisdiction to grant the relief sought herein pursuant to 28 U. S. C. 1254 (1).

Citation of Opinions Below

See appendix. Original opinion November 24, 1964, reargument denied December 14, 1964.

Facts Involved

Petitioners are engaged in the advertising, offering for sale, sale and distribution of a wide variety of products involving goods as dissimilar as perfumes, office machines, household furniture, hosiery, coffee makers, women's lingerie, tableware, table cloths, luggage and blankets. The petitioners function at several different levels in the sale and distribution of the goods involved. In some instances petitioners act as distributors and purchase directly from manufacturers for their own account and re-sell the goods to distributors, jobbers, and retailers. In other instances petitioners act as manufacturer's sales representatives and solicit orders which are filled directly by the manufacturers. In other instances petitioners have their own door to door salesmen who sell certain of the goods involved directly to the consuming public.

In accordance with general sales practice petitioners, while they do not require their retailers to maintain the suggested retail price of their goods, nevertheless place a "list price" upon the goods involved and suggest to their customers that they would be better off economically to sell these goods at the suggested list prices. Actually, again in accordance with normal retail practices, most retailers do not sell the goods involved at the suggested list prices of the petitioners but sell the goods at a lower price. However sporadic sales have been made to customers by house to house canvassers selling the goods involved at the suggested list prices.

The Respondent Federal Trade Commission has promulgated certain "guides" designed to eliminate what the Commission, by administrative fiat, has called "deceptive pricing". The Commission's position is that, *ipso facto*, any use of a list price on merchandise which does not correspond to the normal and regular retail price at which the goods are sold in any respective trade area constitutes a deceptive practice. Interestingly enough, however, the Commission, well aware of the practice in the automobile industry of setting purported "list prices" of automobiles several hundred dollars above the prices at which said vehicles are normally and regularly sold in commerce, has decided to take no action against the automobile industry.

Prior to the institution of the proceeding the Commission took action against the petitioners in connection with their purported pricing practices in connection with women's hosiery, which are practically identical with the pricing practices involved here. After hearing an appeal to the Commission the complaint was dismissed (see *F. T. C.* v. *Sun Gold Industries*, cited with approval by the Second Circuit Court of Appeals in *Royex Corp.* v. *F. T. C.*, 317 Fed. (2nd) 290).

After dismissal of the prior proceedings the Commission brought a new complaint against petitioners claiming, in addition to other violations not material here, that the petitioners were engaging in "fictitious retail pricing". During the course of the investigational proceedings before the Commission a "mail cover" was placed upon petitioners' mail without petitioners' knowledge and by reason thereof, and based upon the information obtained by such "mail cover" investigational personnel of the Commission called upon customers of the petitioners and informed them of the pendency of the Commission's investigation. Because of the adverse effect that these calls had upon the petitioners' business the petitioners execu-

ted an affidavit of facts upon which the Commission relied in great part in the instant proceeding.

Hearings were then had before the Commission in purported compliance with 15 USC 45. At the hearings petitioners made several offers of proof which were rejected by the Commission's hearing Examiner and no such evidence was permitted. Since the instant petition is based, in part, upon these erroneous rulings the portions of the record involved will be quoted here in full.

Record page 17

> Mr. Bader: * * * Mr. Jordan and I had a very fruitful discussion on Monday, and he of course has a very extentive investigational file of the Commission. What Mr. Jordan did with me was simply select from the investigational file those records that he believes supports the Commission's case * * *.
>
> Mr. Bader: * * * at any rate, he gave me copies of advertisements, and of course based upon the field report of the Attorney-Examiner I have agreed that if the witness were called this is what the witness would testify to so that he may not get involved in protracted hearings. There may be other matters in that investigational file that may be helpful for my defense. I therefore move the Examiner at this time to have the right to go through the investigational files of the Commission.
>
> * * * * *
>
> Hearing Examiner Tinley: I understand your position, Mr. Bader, and for the reason that I have previously stated that motion will be denied.

Record page 119

> Hearing Examiner Tinley:
>
> * * * * *

He is proposing to take depositions not concerning the meaning of these terms to the consumer but concerning the custom of retail stores in advertising retail prices higher than their actual selling prices.

Mr. Bader: You are correct, Your Honor.

* * * * *

Record page 121

Hearing Examiner Tinley: Well, his purpose is to show the custom of trade, not to show what the public, what the consumer understands by this advertising, but to show what the custom of the trade is.

* * * * *

Record page 123

* * * * *

Mr. Bader: I am trying to show a general inconsistent pattern and that therefore, the Commission cannot proceed against the general and consistent pattern without bringing an enormous number of cases in every trade area in the country.

Otherwise the proceeding would be a violation of the Fifth Amendment of the Constitution of the United States.

Record page 125

Mr. Bader: No, no. My argument is let us assume this is correct. We must, of course, assume that the affirmative defense is correct, assuming that it is a wide custom in the retail trade area to set retail prices considerably higher than the actual price which is charged. If that constitutes a custom in the retail trade, then everybody knows about it, because otherwise it would not be a custom and

not only do the retailers know about it, but the consuming public knows about it.

Therefore, if such is the fact, the representation of a higher price than the price at which this merchandise is generally sold is not deceptive.

Hearing Examiner Tinley: Of course, that whole conception is in direct conflict with the many decisions which the Commission has made in this area of advertising. (Emphasis supplied.)

* * * * *

Record pages 127-128

Hearing Examiner Tinley: If that constitutes your offer of proof, my ruling is that the evidence is not relevant and I will not grant an application for depositions for that purpose.

Mr. Bader: Now subsidiarily to this point, in the automobile industry specifically, there is a statute of the United States requiring that a list price of the automobile be placed upon the car before it is sold. This appears as a sticker which I believe has to be attached to one of the windows before it is shipped from the manufacturer to the dealer. That list price is never adhered to. The customer who buys an automobile always gets a discount, whether it is by means of an inflated trade-in allowance or by means of a discount from the list price.

I propose to prove by examination of the responsible officials of the Ford Motor Company, General Motors Corporation, and Chrysler Corporation that such constitutes the fact.

I further intend to prove that the Commission is well aware of this fact and has taken no action with respect to such practice and that therefore, any action taken against my client for similar practices would be a violation of the Fifth Amendment of

the Constitution of the United States and I propose to take depositions in Detroit, Michigan to prove such fact.

Record page 130

* * * * *

Mr. Bader: As a matter of fact, the Commission has repeatedly stated informally through several of its personnel to myself that they feel that that is a special case which they are not going to interfere with.

Now I say that allowing an automobile manufacturer to preticket and not allowing me to preticket, this is not a situation where my next door neighbor is doing it and the Commission does not know about it.

Record page 134

* * * * *

Hearing Examiner Tinley: It seems to me that paragraph in the opinion and all the comments of the whole on the subject in that opinion make it clear that the legislation and the situation existing there is dealing with a situation peculiar to the automobile industry and accordingly evidence which you propose to develop by way of deposition or by way of testimony of witnesses with regard to that situation peculiar to the automobile industry, I do not think would alter the situation with regard to fictitious pricing in the area of trade which we are here concerned, and accordingly; I will deny your offer of evidence on that point and reject such evidence if offered and will deny your application for the taking of that deposition on that subject.

Mr. Bader: I, of course, must respectfully except to Your Honor's ruling as I did in the previous case.

Now the third class of evidence I was going to show would involve the same witnesses that I had before, that is, again with testimony in these various cities with the same people involved being buyers of these department stores.

The evidence that I was going to prove there was merchandise, similar in grade and quality to the merchandise sold by respondent, not identical merchandise, but similar merchandise is actually sold at a normal and customary retail price equivalent to the preticketed amount.

* * * * *

Record page 138

Hearing Examiner Tinley: In view of the nature of the advertising representations involved here, Mr. Bader, I do not consider the type of evidence which you now propose would be relevant to a defense of the charges here involved.

The hearings involved were thereafter concluded and an order was issued by the Commission prohibiting the petitioners from engaging in various conduct. While the order involved other practices in addition to the alleged "fictitious retail pricing" the other portions of the order are actually "picayunish" and "quibbling". The Commission's requirements upon the Respondents are actually of such a minor nature, in connection with the other charges, that the petitioners are not raising these points before this Court.

An appeal was thereafter taken to the Commission at which the constitutional points involved were again raised.

The Commission, in an opinion, found on pages 16a and 17a of petitioners' Brief and Appendix before the Court of Appeals, Commissioner MacIntyre not concurring, in effect affirmed the hearing Examiner with respect to the prohibitions of alleged "fictitious retail pricing". The material part of the order involved prohibited petitioners——

> "* * * in connection with the offering for sale, sale or distribution of any articles of merchandise, in commerce, shall forthwith cease and desist from:
>
> (a) Advertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area; * * *"

The appeal was taken to the Court of Appeals for the Second Circuit where the constitutional points involved were again raised. The Court of Appeals, by *per curiam* opinion affirmed the Commission's determination. This petition is taken to this Court requesting this Court to review the determination involved.

Questions Involved Warranting Grant of a Petition for a Writ of Certiorari Herein

1. The failure of the Commission to permit petitioners to introduce evidence showing that, in fact, *petitioners'* use of suggested list prices which were higher than the normal and regular retail prices on which the goods involved were sold did not constitute, in the minds of the general public, a deceptive practice, constitute a denial of

a fair hearing and rendered the subsequent action of the Commission void under the "due process" clause of the Fifth Amendment to the Constitution of the United States.

2. The failure of the Commission to permit petitioners to introduce evidence to show that the Commission had failed to proceed against the automobile industry, and in fact gave the automobile industry immunity from prosecution in connection with alleged "fictitious retail pricing" constitutes violation of the Fifth Amendment to the Constitution of the United States and renders any order involved void.

3. The language of the order appealed from herein requires the petitioners, in order to comply with the order, to violate the anti-trust laws of the United States. To permit an administrative agency to issue an order which, in effect, requires a party to violate the law to comply therewith is so clearly at variance with the constitutional mandate of due process of law as to be unsupportable.

4. The order involved lacks the precision and definiteness required in accordance with the decision of this court in *F. T. C.* v. *Henry Broch & Co.*, 368 U. S. 360. It is an order of the same type as was condemned by the Fifth Circuit Court of Appeals in *Mary Carter Paint Co.* v. *F. T. C.*, 333 Fed. (2nd) 654, certiorari granted —— U. S. ——.

5. The determination of the Circuit Court of Appeals for the Second Circuit, while citing *Mary Carter Paint Co.* v. *F. T. C., supra*, with approval, in effect did not follow this decision since the facts, in the instant case, are almost on all fours with those of the *Mary Carter* case. Certiorari has been granted by this court in the *Mary*

Carter case on petition of the F. T. C. Accordingly, to resolve the conflict between circuits, it is submitted that certiorari should be granted in the instant case as well.

POINT I

The failure of the Commission to permit petitioners to introduce evidence showing that, in fact, *petitioners'* use of suggested list prices which were higher than the normal and regular retail prices on which the goods involved were sold did not constitute, in the minds of the general public, a deceptive practice, constitute a denial of a fair hearing and rendered the subsequent action of the Commission void under the "due process" clause of the Fifth Amendment to the Constitution of the United States.

The order of the Federal Trade Commission, involved herein, was issued under 15 U. S. C. 45. This section reads, in part, as follows:

> "* * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited * * * it shall make a report in writing in which it shall state its findings as to the fact and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice * * * *"

Under the analogous provisions of the Administrative Procedure Act the hearing so required by statute must, in fact, be a fair hearing. At such hearing a party must

have the opportunity to offer all relevant evidence in support of his contentions, particularly since, at the administrative level, the findings of fact of the administrative agency, after holding such hearing, are conclusive. For this reason this court has constantly struck down administrative action wherein, at the administrative level, relevant and material evidence was not permitted to be offered. For example in *Brady* v. *State of Maryand*, 373 U. S. 83 (1963) the withholding of relevant evidence which might have supported the position of the defendant was held to warrant a reversal of the conviction involved. Similar cases of this court, requiring an administrative agency to permit a party subject to administrative action to offer all evidence that he may have in support of his contentions are found in *Asbury Truck Co.* v. *Railroad Commission of California*, 52 Fed. (2nd) 263, affirmed 287 U. S. 570; *Shelley* v. *Kraemer, etc.*, 334 U. S. 1 (1948), *Anderson National Bank* v. *Luckett*, 321 U. S. 233 (1944); and *Simon* v. *Craft*, 182 U. S. 436.

A district court decision, which is almost on all fours with the case at bar, is *Creighton* v. *State of North Carolina*, (D. C. N. C. 1962) 202 Fed. Supp. 765. In this case the court required, as a condition to support a conviction, that compulsory process be given to a party to summon a witness in his behalf. This court, in *Schroeder* v. *City of New York*, 371 U. S. 208 (1962) set forth the requirements for a fair hearing with particularily and, it is submitted, that the Commission, in the case at bar, did not afford petitioners such fair hearing. The court's attention is also directed to *Kwong Hai Chew* v. *Colding*, 344 U. S. 590.

Obviously, since a fair hearing was not granted, the denial thereof constituted a violation of the Fifth Amendment to the Constitution of the United States which reads,

in part, that a party cannot " * * * be deprived of life, liberty or property without due process of law. * * * "

Had petitioners been given the opportunity to introduce the evidence sought they would have proved that, in fact, the use of a list price greater than the price at which the goods involved are normally and customarily sold, is such an obvious commercial practice and is so well known to the general public that, as a matter of law, if not as a matter of fact, the practices involved are not deceptive.

Interestingly enough, while refusing the petitioners the right to take testimony of "public witnesses" to prove that petitioners' practices were *not deceptive*, the Commission has not been reluctant, at all, when it intend to prove a deceptive practice, to take and rely upon the testimony of "public witnesses". As a matter of fact this practice was successfully sustained by the *Commission* in the Court of Appeals in *Gulf Oil Corp.* v. *F. T. C.*, 150 Fed. (2nd) 106 (108) where the court said:

> " * * * The testimony of witnesses drawn from the general public of the impressions made upon their minds by reading the advertisements was admissable. This procedure in investigations of this kind has been in use over a period of years and has received the sanction of the courts. * * * "

Yet, despite this clear mandate, the Commission, in the instant case, refused to allow petitioners to take the testimony of such "public witnesses". A clearer violation of the "due process" clause of the United States Constitution could hardly be found.

POINT II

The failure of the Commission to permit petitioners to introduce evidence to show that the Commission had failed to proceed against the automobile industry, and in fact gave the automobile industry immunity from prosecution in connection with alleged "fictitious retail pricing" constitutes violation of the Fifth Amendment to the Constitution of the United States and renders any order involved void.

In addition to the failures as set forth hereinabove the Commission further refused to permit petitioners to show that despite the Commission's solicitude for the general public with respect to the alleged "deceptive practices" allegedly indulged in by petitioners, it gave the automobile industry, which widely uses the device of fictitious list pricing, complete immunity. Petitioners' offer, before the Hearing Examiner to prove that the Commission had granted the automobile industry complete immunity and was not going to prosecute this industry at all, was rejected. This constitutes a clear violation of the "equal protection of the laws" provision of the Fourteenth Amendment which has been held to be applicable to the Federal government under the Fifth Amendment (*Chambers* v. *State of Florida*, 309 U. S. 227; *Kinsella* v. *U. S.*, 361 U. S. 234; *Cohen* v. *Hurley*, 366 U. S. 117; *Louisiana, etc.* v. *N. A. A. C. P.*, 366 U. S. 293; *Lithographers, etc.* v. *N. L. R. B.*, 301 Fed. (2nd) 20; *Position Finding Corp.* v. *Bendix Corp.*, 205 Fed. Supp. 850, affirmed 371 U. S. 577; *Guillory* v. *Administrators of Tulane University*, 203 Fed. Supp. 855).

There have been a host of cases where, equal protection of the laws has not been granted to petitioners, administrative action has been set aside. *Fowler* v. *State of*

Rhode Island, 345 U. S. 67 (69) is almost directly on all fours with the facts involved in this case. In that case the administrative authorities refused to permit Jehovahs Witnesses to utilize a certain park for religious observance while permitting Catholics and Protestants to do so. In striking down the discrimination this Court said:

> "* * * that broad concession, made in oral argument, is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovahs Witnesses is treated differently from a religious service of other sects. That amounts to the state preferring some religious groups over this one. * * *"

Other cases striking down unconstitutional discrimination are *Watson* v. *City of Memphis*, 373 U. S. 526; *Gray* v. *Sanders*, 372 U. S. 368; *Reynolds* v. *Sims*, 377 U. S. 533; *Turner* v. *City of Memphis*, 369 U. S. 350; *Hoyt* v. *State of Florida*, 368 U. S. 57; *Douglas* v. *California*, 372 U. S. 353.

The situation set forth in the case at bar is directly analogous to the situation in those cases wherein illegal discriminations were struck down. Here petitioners, who are engaged in the sale of a large variety of goods in commerce, are not permitted to utilize any list price which is higher than the normal and regular retail price for which the goods are sold in any trade area. However, despite this, the automobile industry is given blanket immunity to indulge in this practice. Therefore a situation exists here wherein administrative action is unlawfully applied since one business entity is treated differently from another business entity. The unconstitutional nature of such treatment is so glaring, in the case at bar, that this Court ought to grant certiorari to rectify the situation and to afford constitutional justice to petitioners.

POINT III

The language of the order appealed from herein requires the petitioners, in order to comply with the order, to violate the anti-trust laws of the United States. To permit an administrative agency to issue an order which, in effect, requires a party to violate the law to comply therewith is so clearly at variance with the constitutional mandate of due process of law as to be unsupportable.

The order involved requires the petitioners " * * * in connection with the offering for sale, sale or distribution of any articles of merchandise, in commerce, shall forthwith cease and desist from:

(a) Advertising, disseminating or distributing any list, pre-ticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price *or that substantially appreciably exceeds the highest price at which substantial sales are made in respondents' trade area*; * * * " (emphasis supplied).

Petitioners pointed out, before the Court of Appeals, that they have no control over the prices at which their customers sell the goods. Therefore, let us suppose, that petitioners, in good faith, place a retail list price upon a certain article of merchandise of Ten ($10.00) Dollars. Let us suppose that, for some time after this is done, petitioners' customers sell the goods at Ten ($10.00) Dollars. Let us further suppose that subsequently a "discount house" should reduce the price to Eight ($8.00) Dollars. Obviously petitioners' customers must follow suit or they could not stay in business. At this point, under the order involved, the retail price would be one "that appreciably exceeds the highest price at which substantial

sales are made in respondents' trade area" and respondents would be, *ipso facto*, in violation of the order. This point even troubled the Circuit Court of Appeals and, in the opinion of this court, it was held that the clause should have "been drafted somewhat more precisely". The Court of Appeals suggested that the clause read "that appreciably exceeds the highest price at which respondents reasonably believed that substantial sales were being made in respondents' trade area at the time of such advertising, dissemination, or distribution."

However the Court of Appeals further held that since the Commission "interpreted" all orders in accordance with the "guides", and that in the "guides against deceptive pricing" a more precise prohibition was set forth, that the order was enforceable. As will be pointed out in Point IV *infra* such a position is untenable under the prior decisions of this Court. However the Court of Appeals did not meet petitioners' other objection to the order wherein petitioners pointed out that if they attempted to police their retailers they would be in violation of the anti-trust laws of the United States under the well settled line of decisions holding that any attempt by a wholesaler to police retailers to maintain a suggested list price is unlawful and constitutes a violation of the anti-trust laws. See, for example, *Union Circulation Co.* v. *F. T. C.*, 241 Fed. (2nd) 652; *Fashion Originators Guild* v. *F. T. C.*, 312 U. S. 457; *Harriet Hubbard Ayer, Inc.* v. *F. T. C.*, 15 Fed. (2nd) 274; and *Hershey Chocolate Corp.* v. *F. T. C.*, 121 Fed. (2nd) 968.

Obviously any order which requires, as a condition for compliance, that the party involved violate another law to comply with the order is so clearly void as to require no further comment. This Court should grant certiorari in order to prevent such administrative action from being carried out in the future.

POINT IV

The order involved lacks the precision and definiteness required in accordance with the decision of this Court in *F. T. C.* v. *Henry Broch & Co.*, 368 U. S. 360. It is an order of the same type as was condemned by the Fifth Circuit Court of Appeals in *Mary Carter Paint Co.* v. *F. T. C.*, 333 Fed. (2nd) 654, certiorari granted —— U. S. ——.

As was pointed out above the Court of Appeals admitted that the order involved in the instant case was vague. This court in *F. T. C.* v. *Henry Broch & Co.*, 368 U. S. 360 (368) had this to say in connection with the requirements of precision and definiteness of an order of the Federal Trade Commission:

> "* * * the severity of possible penalties prescribed by the amendments for violation of orders that have become final underlies the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. * * *"

An order considerably more definite than the order involved in the case at bar was struck down in *Mary Carter Paint Co.* v. *F. T. C.*, 333 Fed. (2nd) 654 (657), certiorari granted —— U. S. ——, where the court said:

> "* * * we find ourselves in agreement with Commissioner Elman's dissenting opinion, that the opinion of the Commission is completely erroneous, and that its order is lacking in the precision and definiteness which the statute requires of such an order as this. * * *"

In the order involved in the case at bar, as was pointed out *supra* the petitioners have no way of knowing whether they are complying with the order or not. To require the petitioners to resort to "administrative interpretation" of every action that they would desire to take in connection with their sales policy would hamstring their position competitively and probably would force them out of business. Furthermore the mere fact that the Commission holds that certain conduct apparently prohibited in an order is, *at the present time*, not unlawful does not prevent a subsequent Commission, at such subsequent time, to hold the precise conduct involved unlawful. No administrative agency can, in view of the severe penalites involved for violation of such an order, force a respondent to follow the twistings and turnings of administrative policy at the peril of being severely punished if their determination should be proven at variance with the current administrative fiat. As a matter of fact the petitioners, *in this precise case*, have been involved with the same problem. Petitioners' practices in connection with the placing of list prices upon merchandise were held to be *not unlawful* after hearing before a Hearing Examiner, which determination was affirmed on appeal by the Commission itself. Nevertheless, after dismissal of the prior proceeding, the Commission again brought a complaint against petitioners and this time enjoined petitioners from the precise practice which they had previously found lawful upon the ground that, this time, they had been able to secure enough evidence to show the practice deceptive. In a criminal case this would constitute clear "double jeopardy" and petitioners question whether or not, even in this case, such prior determination does not make the instant proceeding void. However, in any event, the situation indicates the importance to petitioners of having a

clear and definite order setting forth what petitioners can and cannot do rather than leaving the matter to the amorphous "administrative discretion".

CONCLUSION

Certiorari should be granted to the Court of Appeals for the Second Circuit, the constitutional issues involved herein reviewed by this Court, and subsequent determination made by this Court in accordance with law.

Respectfully submitted,

HEAVENLY CREATIONS, INC., a corporation;
J. B. PROMOTIONS, INC., a corporation;
AMERICANA STAR SILVER CORP., a corporation; and
SAM S. GOLDSTEIN and SYLVIA GOLDSTEIN, individually and as co-partners trading as Sun Gold Industries and as officers of each of said corporations,

Petitioners.

MAXIMILIAN BADER,
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Opinion of the United States Court of Appeals for the Second Circuit

PER CURIAM:

Petitioners, who sell a variety of products to distributors and jobbers, house-to-house salesmen, and retailers, for resale to consumers, seek review of an order of the Federal Trade Commission directing them to cease and desist from a number of practices found to violate §5 of the Federal Trade Commission Act, 15 U. S. C. §45, or §4 of the Textile Fiber Products Identification Act, 15 U. S. C. §70b, which requires a statement of the generic name of constituent fibers. Finding petitioners' broadside of attacks to be without basis, we deny the petitions and decree enforcement.

The only arguments that require discussion are those relating to the prohibition of preticketing goods at inflated prices. Petitioners' reliance on our having set such an order aside in *Rayex Corp.* v. *FTC*, 317 F. 2d 290 (2 Cir. 1963), ignores all that we said in condemnation of the practice, 317 F. 2d at 292, and the fact that the decision turned on lack of evidence of such preticketing, 317 F. 2d at 294, which here was admitted. Petitioners' offer to prove a custom of fictitious pricing in the retail trade was properly refused. A practice does not "cease to be * * * [unfair] because the falsity of the * * * representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived." *FTC*

v. *Winsted Hosiery Co.*, 258 U. S. 483, 494 (1922). Petitioners did not attempt to and in the nature of things could not prove that no appreciable number of consumers were deceived by a practice so inherently and purposely deceptive; when this court yielded to an argument like petitioners', although on a stronger showing it was quickly set right. *FTC* v. *Standard Educ. Soc'y*, 302 U. S. 112 (1937), reversing in part 86 F. 2d 692, 695-96 (2 Cir. 1936). Heeding that lesson, we have since consistently held that "if the Commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp.* v. *FTC*, 114 F. 2d 33, 36 (2 Cir. 1940), cert. denied, 312 U. S. 682 (1941).

In another aspect of this argument petitioners complain that the Commission has taken no action against other fictitious preticketing, especially in the automobile industry. But this is not at all a case where the Commission has announced a general policy giving sellers a certain degree of latitude and then has proceeded invidiously against a particular one, see *Mary Carter Paint Co.* v. *FTC*, 333 F. 2d 654 (5 Cir. 1964), especially the concurring opinion of Judge Brown at 660. The Commission's endeavors to prevent fictitious pricing are attested by the multitude of proceedings it has brought to that end and by its Guides Against Deceptive Pricing, 29 Fed. Reg. 178 (1964), adding 16 C. F. R. §14.10 (1964). Since complete enforcement coverage is impossible as to so widespread a practice, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Indus., Inc.* v. *FTC*,

355 U. S. 411, 413 (1958). Nothing in the Automobile Information Disclosure Act, 15 U. S. C. §§1231-33, sanctions fictitious or deceptive preticketing in that industry, see *Baltimore Luggage Co.* v. *FTC*, 296 F. 2d 608, 612 (4 Cir. 1961), cert. denied, 369 U. S. 860 (1962).

Petitioners' next objection concerns the Hearing Examiner's refusal to grant an oral request in inspect the Commission's investigative files, which allegedly would have revealed many instances in which consumers were not deceived. But, apart from any other considerations, petitioners did not follow the path prescribed for such relief—a written application, not to an examiner but to the Commission itself, setting forth the interest of the applicant and a description of the materials sought and the purpose for which they would be used. 16 C. F. R. §§1.133 and 1.134 (Supp. 1964).

Finally, petitioners complain that so much of the order as prohibits a preticketed price "that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area" puts them in peril of a contempt proceeding if price-cutting in an area should cause prices to drop below what petitioners had in good faith believed to be the level when they preticketed. It might have been better if the alternative clause in the order either had been combined with the first clause relating to good faith estimates, as is done in the Guides, see 16 C. F. R. §14.10(c)(7), or had been drafted somewhat more precisely, e.g., "that appreciably exceeds the highest price at which respondents reasonably believed that substantial sales were being made in respondents' trade area at the time of such advertising, dissemination, or distribution." But counsel for the Commission tell us that this is what the order means, stating, "A 'good faith' estimate by petitioners will not be in violation of the order," and the Commission's

opinion says its policy is "to interpret all outstanding cease and desist orders against deceptive pricing, whatever the precise form of words employed in the particular order, as if they expressly incorporated the provisions of the newly revised Guides Against Deceptive Pricing." We have become somewhat impatient as to the genuineness of fears that a great agency of government like the Commission will behave in any such literalistic and arbitrary fashion as petitioners suggest. What we said on that score in *Vanity Fair Paper Mills, Inc.* v. *FTC*, 311 F. 2d 480, 488 (2 Cir. 1962), applies *a fortiori* in the light of the salutary provision for preliminary advice on compliance added in the 1963 revision of the Commission's Rules of Practice, 16 C. F. R. §3.26(b) (Supp. 1964).

The petitions to review are denied; the Commisssion may submit a decree.

Opinion of the Commission

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
John R. Reilly

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[SAME TITLE]

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Docket No. 8448

OPINION OF THE COMMISSION

The complaint in this matter charges repondents—a group of closely related firms, and the individuals who control them, engaged in the sale of a variety of merchandise to distributors, jobbers and retailers—with deceptive advertising in violation of Section 5 of the Federal Trade Commission Act and false advertising in violation of Section 3 of the Textile Fiber Products Identification Act and of the Rules and Regulations promulgated under the latter statute. The matter is before the Commission on the cross-appeals of the parties from the initial decision of the hearing examiner, in which he dismissed the complaint in part and upheld it in part, and entered a cease

and desist order. Most of the contentions of the parties are adequately dealt with in the initial decision, and require no further discussion. We consider in this opinion only those issues having some general significance.

Fictitious Pricing

The hearing examiner refused respondents' offer to prove that the Commission has deliberately declined to proceed against fictitious pricing in the automobile industry. Respondents' theory is that if, in fact, the Commission has a policy against issuing fictitious-pricing complaints in a particular industry, any fictitious-pricing actions in other industries—including the present action—would contravene the requirements of due process of law, and hence violate the Federal Constitution. Such a theory is untenable.[1] Moreover, it is difficult to see how respondents can be injured or aggrieved in any way by the Commission's alleged failure to take action against firms which are in an entirely different industry and are not competitors of respondents.

Respondents also contend that paragraphs 1(a) and 1(b) of the cease and desist order contained in the initial decision, which deal with the advertising of fictitious suggested retail or list prices, are vague, and cannot, as a practical matter, be obeyed. Without agreeing with respondents' position, we have decided to modify this part of the order by expressing the prohibition in the terms

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[1] See, e.g., *Moog Industries, Inc.* v. *F.T.C.*, 355 U. S. 411, 413. We note that the Automobile Information Disclosure Act, 15 U. S. C. §§1231-33, does not preclude the Commission from taking action, where appropriate and in the public interest, against fictitious preticketing or related deceptive practices in the automobile industry. *Baltimore Luggage Co.* v. *F. T. C.*, 296 F. 2d 608 (4th Cir. 1961).

of the Commission's newly revised Guides Against Deceptive Pricing (January 8, 1964). The standards in these Guides offer guidance to the businessman who desires in good faith to avoid committing the unlawful practices described in them. Guide III deals specifically with the practice—advertising of fictitious suggested retail or list prices—in which respondents have been found to have engaged; and if respondents in the future conform their conduct to the standards set forth in Guide III, they will be in compliance with the fictitious-pricing part of the cease and desist order.[2]

In modifying the order contained in the initial decision, we emphasize that respondents' duties under the order are no different from what they would be if the examiner's order were adopted *in haec verba*. For it is the Commission's policy to interpret all outstanding cease and desist orders against deceptive pricing, whatever the precise form of words employed in the particular order, as if they expressly incorporated the provisions of the newly revised Guides Against Deceptive Pricing.

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[2] If the Guides do not answer all of the specific questions that may arise as to respondents' obligations under the cease and desist order, the Commission's procedures afford ample opportunity for respondents to obtain definitive advice from the Commission as to the application and interpretation of the order. *Atlantic Products Corp.*, F. T. C. Docket 8513 (Interlocutory Order of December 13, 1963); *Foremost Dairies, Inc.*, F. T. C. Docket 7475 (decided May 23, 1963); Section 3.26(b), Rules of Practice and Procedure (August 1, 1963); see *Vanity Fair Paper Mills, Inc.* v. *F. T. C.*, 311 F. 2d 480, 488 (2d Cir. 1962).

Other Relief Issues

In addition to modifying the fictitious-pricing part of the examiner's order, we have modified other parts of the order concerned with violations of Section 5. Two changes in the terms of the order in particular should be noted. First, we have deleted the provision that appears as paragraph 1(e) of the examiner's order, which would require respondents affirmatively to disclose the country of origin of their merchandise. The foreign-origin issue in this case, as framed in the complaint and developed at trial, was whether respondents had misrepresented that certain products (for example, perfume and linen) came from foreign countries (for example, France and Ireland) which are particularly noted for such products. The issue, in other words, was whether respondents had affirmatively misrepresented country of origin, not whether by failing altogether to disclose the true country of origin they were concealing a material fact. Nothing in the record warrants an order directed against the latter, and quite distinct, form of deceptive conduct.

Second, paragraph 1(g) of the order contained in the initial decision would require respondents to cease and desist from "representing, directly or indirectly, that said products are guaranteed unless the name and address of the guarantor are clearly and conspicuously disclosed." However, the deception charged in the complaint and found by the examiner involved, not failure to disclose the guarantor's identity, but falsely stating the guarantor's identity. Hence, the order properly should forbid misrepresenting the identity of the true guarantor.

Generic Names Under the Textile Act

The Textile Fiber Products Identification Act requires that designation of textile fiber content in advertising be by generic name (see Sections 4(b)(1) & 4(c)), and Section 7(c) authorizes the Commission to establish generic names for manufactured fibers. The Commission has done so (see Rule 7, Rules and Regulations Under the Textile Fiber Products Identification Act (March 3, 1960)). Respondents used the term "Orlon" to desigante a manufactured fiber in a textile fiber product. The term is not among those listed in Rule 7, and on that ground the examiner held that its use violated the Textile Act. Respondents contend that the examiner erred in rejecting respondents' offer to prove that "Orlon" has become accepted by the consuming public as a generic name for the fiber in question.

Such a contention misconceives the purpose and design of the Textile Act. While both the Federal Trade Commission Act and the Textile Fiber Products Identification Act embody the same basic principle of protecting the consumer from deceptive representations, they do so in different ways: the Federal Trade Commission Act by a general prohibition of "deceptive acts or practices", the Textile Act by requiring explicitly and in detail high and uniform standards in the labeling and advertising of textile fiber products.

The Textile Act uses the term "generic name" in a special sense, namely, as designating those generic names which the Commission is authorized by the Act to establish; the language of Section 7(c), which refers to the "establishment", not ascertainment, of generic names, re-

quires this interpretation.[3] Respondents are free to use the term "Orlon" in their advertising, but they must also disclose the generic name for the fiber which the Commission has established, pursuant to the Act, in the interest of standardizing disclosure of fiber content.

Commissioner MacIntyre did not concur and Commissioner Reilly did not participate.

February 25, 1964

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[3] See also Rules 7 and 8, and the Commission's statement on the Rules and Regulations promulgated under the Act, reported in 2 CCH Trade Reg. Rep. ¶8076. The "Orlon" issue was discussed by the Commission in the course of a series of questions and answers furnished for the assistance of persons seeking to comply with the requirements of the Textile Act and the Rules and Regulations promulgated under it:

> "Q. 43. Can fiber trademarks such as 'Orlon' and 'Acrilan' be used alone in setting forth the required content information? A. No. When fiber trademarks are used in setting forth the required information they must be used in immediate conjunction with the generic name of the fiber to which they relate in type or lettering of equal size. The first time a fiber trademark or generic name appears on the label full content disclosure must be made." 2 CCH Trade Reg. Rep. ¶8098, p. 13173 (March 10, 1960) (see also question no. 100, p. 13177).

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 892

HEAVENLY CREATIONS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–24) is reported at 339 F. 2d 7. The opinion and order of the Federal Trade Commission (App. 9a–17a)[1] have not been officially reported.

JURISDICTION

The judgment of the court of appeals denying the petition to review and enforcing the Commission's order, was entered on December 16, 1964. The petition for certiorari was filed on February 9, 1965. The ju-

[1] "App." refers to the brief and appendix filed by petitioners in the court below. "Comm. App." refers to the brief and appendix filed by the Commission in the court below.

766-723—65

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in finding that petitioners' utilization of fictitious retail prices constituted an unlawful deceptive practice, the Federal Trade Commission correctly rejected petitioners' proffered evidence regarding (1) the public's familiarity with the practice of using fictitious list prices and (2) the custom of using fictitious list prices in the automobile industry.

2. Whether the Commission's cease and desist order properly prohibits petitioners from preticketing or advertising their goods with list prices appreciably in excess of the highest retail price at which substantial sales are made in petitioners' trade area.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioners Sam and Sylvia Goldstein are the principal stockholders and general policymakers of the corporate petitioners, New York corporations engaged in the advertising, sale and distribution of various products including costume jewelry, perfumes, dishware, and appliances (App. 22a–23a).

The Federal Trade Commission's amended and supplemental complaints (App. 45a–64a) charged that petitioners violated Section 5(a)(1) of the Federal

Trade Commission Act by engaging in deceptive advertising and fictitious pricing (App. 57a). After a full hearing, the Commission examiner found that advertising and other promotional materials distributed by petitioners contained substantially higher price quotations for various products than the customary and usual retail prices for those articles and that petitioners attached labels to certain of its products which contained prices substantially higher than the customary retail prices for those products (App. 25a–30a).

The instant petition relates principally to the examiner's rejection of petitioners' attempts to prove (1) a generally understood custom of fictitious pricing in its particular retail trade, and (2) the existence of fictitious preticketed prices in the automobile industry (Pet. 40a–44a). The Commission held that such evidence was properly rejected (App. 12a–17a) and ordered petitioners to discontinue the deceptive practices (App. 9a–11a). The court of appeals agreed, denied the petitions to review, and enforced the order (Pet. 21–24).

ARGUMENT

1. (a) Misrepresentations concerning the regular and customary price of a product offered for sale have long been recognized as an unfair and deceptive practice within the meaning of the Federal Trade Commission Act. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; *Rayex Corp.* v. *Federal Trade Commission*, 317 F. 2d 290 (C.A. 2); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (C.A. 7), certiorari denied,

364 U.S. 883. The objection to fictitious pricing of merchandise is that the purchaser is misled into believing that he is obtaining a bargain at a reduced price when, in fact, he is paying the usual and regular price for the article. The courts have uniformly upheld Commission orders prohibiting both advertising fictitious retail prices (*The Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765 (C.A. 3), *Giant Food Inc.* v. *Federal Trade Commission*, 322 F. 2d 977 (C.A. D.C.)) and preticketing products with fictitious prices unrelated to those at which the article is usually sold in trade areas where the representation is made. *Helbros Watch Co.* v. *Federal Trade Commission*, 310 F. 2d 868 (C.A. D.C.), certiorari denied, 372 U.S. 976; *Clinton Watch Company* v. *Federal Trade Commission*, 291 F. 2d 838 (C.A. 7), certiorari denied, 368 U.S. 952.

Although petitioners admit (Comm. App. 17b–23b) having engaged in the practices found by the Commission to be deceptive, they argue that the practice cannot be considered deceptive (Pet. 11–13) if they demonstrate (1) that it is customary to state list prices greater than the price at which the goods involved are ordinarily sold and (2) that this practice is known to the public. They contend that the Commission violated due process by refusing to hear evidence concerning the retail trade practice of inflating suggested list prices. The contention warrants no consideration by this Court. Petitioners' defense is that the public has become so sophisticated that no one is deceived by their fictitious pricing practices (Pet. 5–6). Since it is well settled that the Commission acts not

for the sophisticated alone, this defense has consistently been rejected. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112; *Helbros Watch Company* v. *Federal Trade Commission*, 310 F. 2d 868 (C.A. D.C.), certiorari denied 372 U.S. 976; *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C.A. 2); *Charles of The Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (C.A. 2). Fictitious pricing is illegal even though it is obvious to some that the price tag is only a come-on. "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 Fed. 73, 75 (C.A. 2). Accordingly, the court of appeals was clearly correct in holding that petitioners' offered proof was irrelevant to the validity of practices so inherently and purposely deceptive (Pet. 22).

(b) Nor is there merit to petitioners' objection (Pet. 14–15) to the Commission's refusal to allow evidence of the automobile industry's alleged utilization of fictitious retail prices. As the court below stated (Pet. 22):

> Since complete enforcement coverage is impossible as to so widespread a practice, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).

The fact that another industry may use the same illegal practice because the Commission has not yet been able to deal with it does not justify petitioners' use of the practice in its industry.

2. There is no basis for petitioners' objection to that part of the Commission order requiring them to cease and desist "[a]dvertising, disseminating or distributing any list, preticketed or suggested retail price that is not established in good faith as an honest estimate of the actual retail price or that appreciably exceeds the highest price at which substantial sales are made in respondents' trade area; * * *" (App. 10a). Petitioners argue (Pet. 16–17) that adherence to the order would require petitioners to police the resale prices of their retailers and thus violate the antitrust laws. The order clearly contemplates no such anticompetitive action. It simply prohibits petitioners from continuing their practice of fictitious pricing. They can comply by ceasing all preticketing. Or they can continue preticketing if they make a *bona fide* effort to ascertain the retail price level before preticketing. The court of appeals found, correctly we believe, that the order requires only a "good faith" estimate of the price at which substantial sales are made in petitioners' trade area (Pet. 23).

The latter point disposes of petitioners' final contention (Pet. 18–20), that the order is unduly vague. The requirement of the order is satisfied by a belief, in good faith, that any price preticketed is the price at which the goods are selling. Moreover, the order contains the usual provisions for the filing of a compliance report within 60 days (App. 11a), and any diffi-

culties foreseen by the petitioners can be avoided by obtaining the Commission's approval of their proposed plan of compliance. In the event they should desire to alter their original compliance proposal, they have recourse to the Commission for advice. *Regina Corporation* v. *Federal Trade Commission*, 322 F. 2d 765 (C.A. 3); *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 987 (C.A. D.C.).

CONCLUSION

The decision below is plainly correct and presents no important question of law warranting further review. The petition for certiorari should be denied.

Respectfully submitted.

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